United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-1051

76-1052-3

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UNITED STATES COURT OF APPEALS

For The Second Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

STANLEY SIMPSON, JOHN OLIVER BRYANT and EARL BEST,

Defendants-Appellants.

On Appeal from the United States District Court for the Southern District of New York

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JOINT BRIEF OF DEFENDANT-APPELLANT EARL BEST
and DEFENDANT-APPELLANT JOHN OLIVER BRYANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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UNITED STATES OF AMERICA,

Appellee,

-v.-

STANLEY SIMPSON,
JOHN OLIVER BRYANT, and
EARL BEST,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANTS-APPELLANTS JOHN OLIVER BRYANT AND EARL BEST

Issues Presented

1. Did the trial court erroneously find that the arrest of defendant-appellant Earl Best was based on probable cause and thereby erroneously deny the motions to suppress the fruit of said arrest consisting of a typewritten demand note and Best's confession.

2. Whether it was error for the trial court to fail to charge on the law of preparation vis a vis attempt when the issue of the defendants' intent upon entering the Bank was the only issue of fact raised at the trial.

3. Whether the trial court erred under F.R. Cr.P. 32(c)(3) when it refused to make the report of the presentence investigation available to defense counsel at the time of the sentencing.

STATEMENT OF THE CASE

Preliminary Statement

Stanley Simpson, John Oliver Bryant and Earl Best appeal from judgments of conviction entered January 13, 1976, in the United States District Court for the Southern District of New York following a six-day trial before the Honorable Irving Ben Cooper, United States District Judge for that District, and a jury. The three defendants-appellants are filing a joint appendix. Bryant and Best are also filing a supplemental appendix and join in this brief. The Simpson brief is filed under separate cover.

Indictment 75 Cr. 436, filed May 2, 1975, charged Simpson, Bryant and Best in two counts. The first count charged conspiracy to commit bank robbery. The second count charged that the three entered the Manufacturer's Hanover Trust Company, 130 Fifth Avenue, New York, New York on April 24, 1975, with the intent to

take by intimidation money in the custody of the Bank.

Motions to suppress a demand note and a mock grenade were denied by Judge Cooper without a hearing in an opinion entered July 1, 1975, and reported at United States v. Simpson, 400 F. Supp. 1396 (S.D.N.Y. 1975). Trial commenced on September 2, 1975, when the jury was selected and sworn. Testimony was taken on September 3, 4 and 5, 1975. None of the three defendants testified in his own behalf. The jury was charged on September 8, 1975, and deliberated during the evening of September 8 and throughout the day of September 9, 1975, to verdict. Bryant and Best were found guilty as charged. Simpson was acquitted on the conspiracy count and convicted on the substantive count (J.App. Tr.688).*

The three defendants were sentenced on October 9, 1975, for study pursuant to 18 U.S.C. §4208(b).(J.App.Tr.714). The three defendants were re-sentenced on January 13, 1976, each for a period of 12 years pursuant to 18 U.S.C. §4208(a)(2). (J.App. Tr.737). Each defendant received the same sentence "since the challenges offered by each one of these defendants is almost identical because of the background and because of the mental status and because of all of the factors that a judge considers

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* Parenthetical references to the Joint Appendix are identified "J.App.Tr."

at the time of sentence, because they are almost twins so to speak, in those factors * * *." (J.App.Tr.736). All three are presently serving their sentences of incarceration.

STATEMENT OF THE FACTS

(1) The Arrest

On April 24, 1975, at approximately 1:30 P.M., three plain-clothes police officers, then on anti-crime duty, observed two of the defendants, Earl Best and John Oliver Bryant, in the vicinity of the Chemical Bank at 156 Fifth Avenue in Manhattan (S.App. Henry Tr.77).* They saw Bryant enter the bank, while Best remained outside (S.App. Henry Tr.78-80).

John Reddy, one of the three police officers, followed Bryant into the bank (S.App. Reddy Tr.152). He saw Bryant first wait on the teller's line then leave the bank (S.App. Reddy Tr.154). The police officers then observed Best walk east on 20th Street and have a conversation with another male (Stanley Simpson) (Galluba, Tr.165) who was in the driver's seat of an auto with the motor running (S.App. Henry Tr.79; S.App. Reddy Tr. 154).

After Bryant emerged from the bank, Best was seen having

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* The parenthetical references to the Supplemental Appendix use the abbreviation "S.App." followed by the name of the particular witness testifying."

a conversation with him and the two then walked north on Fifth Avenue (S.App. Reddy Tr.155), followed by Officer Reddy. Reddy saw them "peer" through the window of the Chase Manhattan Bank, have a five minute conversation and walk south on Fifth Avenue (S.App. Reddy Tr.159). At this point, Officer Reddy was joined by Officer Ricciardi, who had been summoned as part of a backup unit, and Sergeant Henry (S.App. Reddy Tr.159). All three officers then followed Bryant and Best to the Manufacturers Hanover Bank at 18th Street and Fifth Avenue, where the two were seen having another short conversation, looking into the window of the bank, and then entering the bank (S.App. Reddy Tr.159-160).

Officer Galluba, the third officer of the original anti-crime team, kept Stanley Simpson and the tan Pontiac in which he was seated under observation (Galluba Tr.266).

Sergeant Henry observed Bryant and Best in the Manufacturers Hanover Bank, by peering through the window (S.App. Henry Tr. 86). He observed Best on the teller feeder line and Bryant in the rear of the bank in conversation with a uniformed guard (S.App. Henry Tr.86). While Best stood on the teller's line, Bryant, "with his left hand in his left coat pocket" had his right arm around the guard's waist, near the guard's revolver. He then walked with the guard to an alcove in the rear of the

bank (S.App. Henry Tr.87).*

Although Sergeant Henry had observed Bryant and Best for only 20 seconds of the minute and a half they were in the bank (for 3 intervals, the longest of which was six or seven seconds) (S.App. Henry Tr.95) and hadn't seen Best talk to anyone or put his hand in his pocket in a "threatening way" (S.App. Henry Tr. 97), as soon as he saw Best walk out of the bank, he "stopped" him outside the bank and "frisked" him (S.App. Henry Tr.89).

Sergeant Henry was, at that time accompanied by Officers Reddy and Ricciardi, all three of whom surrounded Best, one in front and one to either side (S.App. Reddy Tr.204). Best was told, "We are police. Stop. Don't move." Best obeyed the order (S.App. Reddy Tr.205). Thereupon, Best was immediately frisked by Sergeant Henry in the presence of the other two officers (S.App. Reddy Tr.206). In so doing, Sergeant Henry had his gun drawn, holding it inside his coat pocket (S.App. Henry Tr.438). Nothing suspicious was found as a result of the frisk (S.App. Henry Tr.101)(S.App. Reddy Tr.207).

Officers Reddy and Ricciardi then "stopped" Bryant as he was coming out of the bank.

Sergeant Henry "asked" Best to come with him to where the other two officers had "stopped" Bryant, approximately fifty feet away (S.App. Henry Tr.102). While walking with Best to the other two officers, Sergeant Henry saw Best attempt to discard a piece of

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* The guard, however, didn't recall any such occurrence (Vita, Tr.450-452).

paper, which Henry retrieved (S.App. Henry Tr.90-91). The paper contained a typewritten note which stated:

> FREEZE: KEEP HANDS IN VIEW: DON'T TRY ANYTHING OR YOU WILL DIE: I HAVE A BOMB: PUT ALL MONEY ON TOP BIG BILLS FRIST [SIC]: NOW, WHEN YOU FINISH AND I GO WAIT FIFH-TEEN [SIC] MINTUES [SIC] BEFORE YOU DO ANYTHING. YOU WILL BE WATCHED. (Government's Exhibit 17 in evidence).

Bryant was "frisked" by Officer Reddy who discovered a "dummy hand grenade" (a fake or simulated grenade (Tr.411)) in his coat pocket (S.App. Reddy Tr. 164-165).

Meanwhile, Officer Galluba and Detective Schwartz followed the tan Pontiac in which they saw Simpson seated, but were stopped from following it closely because of a traffic light (Galluba Tr.300). When they found the car, it was parked and locked and Simpson was not in sight. After keeping the car under observation for some time and having a conversation with Sergeant Henry, Officer Galluba walked west on 19th Street to Park Avenue South and there saw Simpson. Officer Galluba then joined Detective Schwartz and the two followed Simpson in a Police Department taxi cab (Galluba Tr.305). They finally parked the cab and arrested Simpson (Galluba Tr. 306).

Later that afternoon, less than two hours after his arrest (S.App. Martinolich Tr.412) Earl Best made a confession to Special Agent Joseph D. Martinolich of the FBI (S.App. Martinolich Tr. 418).

(2) The Charge

The Court's charge commenced at 2:17 P.M. (J.App. Tr. 588); there was a short recess in the middle (J.App.Tr.622-623); and it concluded at 4:35 P.M. (J.App.Tr.649). In those 61 pages and some two hours of charge, the Court spent little over a page on the substantive charge (J.App.Tr.629-630).

The only factual issue raised by the defendant Bryant was the issue of his intent as he entered the Bank (Bryant counsel, Tr.500-502). Yet nowhere did the Court charge on that issue. The Court did not even read the unlawful entry statute which founded the substantive charge contenting itself with merely reading the bank robbery paragraph of 18 U.S.C.§2113(a) (See Charge Tr.623; objection made at Tr.651-652). The jury might find the requisite intent from the note and the mock grenade; both these items were stressed by the Court in the charge (Tr.628). The jury might find to the contrary because no alarm was given (Martinolich Tr.432) and because Bryant and Best left the third bank, as Bryant had left the first bank (S.App. Henry Tr.82), without making a demand for money. The Court failed to present the defense argument; on the contrary, the Court instructed the jury not to consider the defense argument:

> "Some of you may have noticed that there has been no evidence that any of these banks were actually robbed. I have said that backwards and forwards, but I want to be sure you understand that the government

> does not have to prove that these defendants did, in fact, rob a bank. They are not charged with bank robbery" (J.App.Tr.632).

Finally, the Court used an example on the conspiracy charge which focused the attention of the jury on acts which far preceded the locus poenitentiae (See the parade simile at Tr. 609-610, 618-619). Again, the effect of that charge was to stymie the defense proffered by Bryant.

So we have, at bottom, a charge to the jury on the conspiracy count which carries a five-year penalty, while the defendants were sentenced on the substantive count which carries a twenty-year penalty.

(3) The Sentence

The Court first sentenced the three defendants to be studied pursuant to 18 U.S.C. §4208(b).(J.App.Tr.714). When the defendants returned for sentence, the Court refused to make the pre-sentence report available to counsel (J.App.Tr.722-723; see J.App.Tr.700-701).

The Court denied the applications by Bryant and Simpson for youthful offender treatment (Tr.738, 739), which denial was inconsistent with the Court's description of the type of sentence it was imposing:

> "I therefore have decided not to send you to a jail type of institution for a given number of years, whether it is five,

> ten, 15 or 20. I have decided to put you in a place where you will be taught something as to how to use your God given skills or, rather, convert whatever power you have got into skills, where you can learn a trade, where you can learn values that you may adopt as your own, and that you may fashion your future." (J.App.Tr.735-736).

The defendants were each sentenced to twelve years pursuant to 18 U.S.C. §4208(a)(2). (J.App.Tr.737).

ARGUMENT

POINT I

DEFENDANT-APPELLANT EARL BEST'S ARREST WAS NOT BASED UPON PROBABLE CAUSE AND THE TRIAL COURT THUS IMPROPERLY DENIED HIS MOTION TO SUPPRESS THE FRUITS OF THAT ARREST, CONSISTING OF A DEMAND NOTE AND HIS CONFESSION.

Prior to trial, appellant Best, by his then court-appointed attorney, Elliot A. Taikeff, Esq., on May 21, 1975, made a motion to suppress the demand note (the contents of which appear herein at page 7 supra), his confession to Special Agent Joseph D. Martinolich of the F.B.I., and the "dummy" hand grenade found on co-appellant Bryant by the arresting officers (S.App. Written Motions Tab. H)* The motion was grounded upon the illegal arrest of the defendants Best and Bryant and was denied by the trial court on July 1, 1975 (S.App. Tab J).

At trial, the undersigned, having been assigned by the trial

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* The appellant Bryant also moved to suppress the note and grenade (S.App. Written Motions, Tab I).

court as Best's trial counsel, renewed the motion to suppress the demand note and Best's confession, in light of the testimony of Sergeant William Henry (S.App. Motions. Tr.383). The basis for the motion was that the "stop" of Best by Henry was in fact an arrest, which arrest had been made without probable cause (S.App. Motions Tr.385-386).

Henry had testified that Bryant and Best were in the Manufacturers Hanover Bank about a minute and a half (S.App. Henry Tr.94), and that he had them under observation for only about 20 seconds (S.App. Henry Tr.95). Nor did he view Bryant and Best for a continuous 20 seconds; he looked into the bank two or three times during that 20 seconds the longest time of continuous viewing being six or seven seconds (S.App. Henry Tr.97). He didn't see Best approach a teller, put his hand in his pocket in a threatening way or talk to anyone (S.App. Henry Tr. 97).

Officer Reddy had testified that upon exiting the bank, Best was surrounded by three plainclothes officers (S.App. Reddy Tr. 204) and was told "We are police. Stop. Don't move." (S.App. Reddy Tr. 205). Best was immediately frisked by Sergeant Henry (S.App. Tr.206). Sergeant Henry didn't tell Best he was going to arrest him; but after the "stop" and "frisk", and before Best attempted to discard the "demand note", had Best wanted to leave, Henry wouldn't have let him (S.App. Henry Tr. 104). Nothing suspicious was found as a result of the frisk (S. App. Henry Tr.101).

Sergeant Henry had testified that when he completed his frisk, he didn't keep his hands on Best (S.App. Henry Tr.102). Officer Reddy, however, who had been with Henry when Best was "stopped" and "frisked" until Bryant came out of the bank, testified that Sergeant Henry had his hand on Best's arm after the "frisk" (S.App. Reddy Tr.207-208).

Further, Officer Reddy had testified that he had never seen Best go up to a teller in the Manufacturers Hanover Bank during his observations (S.App. Reddy Tr.199-200). Sergeant Henry apparently also never saw Best go to a teller (S.App. Henry Tr.97).

On the basis of the facts outlined above, and the facts contained in defendant Best's Exhibit C for identification (S.App. Best's Ex.C, Tab K)which document, purportedly written by Sergeant Henry, states in part:

> "The officers determined that a robbery was in progress and decided to maintain their position outside the bank and apprehend the perpetrators by suprise as they left the bank to avoid a possible hostage situation or a chance of a civilian or police officers being killed or injured. As the perpetrator Best continued to look around while on the teller's line he apparently observed the officers taking their positions outside the bank, he suddenly bolted from the line and began to run out the side door exit. The officers with guns drawn, seeing this, ran to the side door where they apprehended him. While Sergeant Henry was frisking the perpetrator, Officer Ricciardi then observed that the other perpetrator Bryant was coming out of the other side door of the bank, he and Officer Reddy in immediate

> pursuit and after a short chase, apprehended him."*

it was contended both that the "stop" of Best, was in fact an arrest from the beginning or became an arrest before Best attempted to discard the demand note and that the trial court should permit Sergeant Henry to continue his evidence in order to establish whether or not Best was "stopped" with guns drawn so as to develop a full record on the issue of "stop"and"frisk" versus "arrest" (S.App. Motion Tr.384-387). Although it was conceded at that time, and is now, that the officers had the right to "stop"and "frisk" Best (S.App. Motion Tr.385), it was contended, and is now, that they did not have probable cause to arrest him, at least until such time that the demand note and the hand grenade had been found, by which time, Best had already been placed under arrest.

The trial court allowed Henry to be recalled** to clear up the matter of whether or not Best was approached with guns drawn, but found, apparently, that it was unimportant whether the "stop" was in fact an arrest from the beginning, ruling that as a matter of law, there was probable cause for an arrest at the point Best

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* It is respectfully submitted that Best's Exhibit C for identification should have been received in evidence at the suppression hearing Fed. Rules of Evid. 803(6) and (24). The trial court however, sustained the government's objection to its admission (S.App. Tr.442-443). It is submitted that this ruling was erroneous.

** He was recalled in the absence of the jury (S.App. Henry Tr.436).

was "stopped" (S.App. Motion Tr.395). The trial court denied the renewed motion to suppress at that time (S.App. MotionTr. 395), subject to any additional evidence that might be brought out on Henry's continued testimony (S.App. Motion Tr.400).

The continued cross examination of Sergeant Henry disclosed that he had drawn his gun out of his holster at 20th Street and Broadway and had placed it in his right hand pocket (S.App. Henry Tr.438). He had "arrested" Best with his gun in his pocket and had kept his hand on his gun during most of the time that he was frisking Best (S.App. Henry Tr.438). Nor, as was written in Best's Exhibit C for identification, had he seen Best "bolt" from the teller's line (S.App. Henry Tr.441).

After Henry's further testimony, the trial court again denied all defense motions (S.App. Henry Tr.448).

It is respectfully submitted that it was error for the trial court to have denied the renewed motions to suppress the demand note and Best's confession. In connection with this contention, three areas will be explored herein, (1) the point in time at which Best's arrest, in its constitutional sense, occurred, (2) whether, at the time of such arrest, there was probable cause to make an arrest and (3) whether the demand note and Best's confession were the fruits of that arrest within the meaning of

Wong Sun v. United States, 371 U.S. 471 (1963).

(1)

It is clear that even a mere "stop" may constitute an "arrest" (within the word's 4th Amendment meaning) when the "officer's purpose is to assert custody over the individual in connection with a crime", Fuller v. United States, 407 F.2d 1199, 1207 (D.C. Cir. 1968), cert. denied, 393 U.S. 1120, or, regardless of the officer's intent not to make a "formal" arrest (or did not think that his actions constituted an arrest), where there is a significant interference with the defendant's liberty. United States v. See, 505 F.2d 845, 855 (9th Cir. 1974), cert. denied, 420 U.S. 992; Taylor v. State of Arizona, 471 F.2d 848, 851 (9th Cir. 1972), cert. denied, 409 U.S. 1130; United States v. Jones, 352 F. Supp. 369, 378 (S.D.Ga., 1972), aff'd, 481 F. 2d 1402 (5th Cir. 1973). This Court so held in United States v. Thompson, 356 F. 2d 216, 222 (2nd Cir. 1965), cert. denied, 384 U.S. 964. See Henry v. United States, 361 U.S. 98, 103 (1959).

A significant factor taken into consideration in distinguishing an "arrest"from a "stop" is the degree of force used by the police in restricting the defendant's movements. Thus, cases have turned on whether the police approached with drawn guns. See, United States v. Ramos-Zaragosa, 516 F. 2d 141, 144 (9th Cir. 1975); Taylor v. State of Arizona, supra.; People v. Armour, 46 AD 2d 872(2) (1st Dep't 1974). Furth[illegible] evidence of a

significant interference with the defendant's liberty of movement is found where, in addition to being approached with drawn guns, the defendant is "surrounded" by police officers. United States v. Strickler, 490 F.2d 378, 380 (9th Cir. 1974), wherein the court stated:

> The restriction of Strickler's 'liberty of movement' was complete when he was encircled by police and confronted with official orders made at gunpoint.

Here, as soon as Best emerged from the bank, he was "surrounded" by three officers (S.App. Reddy Tr.204), held at gunpoint (although the gun was in the officer's pocket) (S.App. Henry Tr. 438), told "We are police. Stop. Don't move. (S.App. Reddy Tr. 205), and immediately frisked by one officer (S.App. Reddy Tr. 206), who kept his hand on his gun for most of the time Best was frisked (S.App. Henry Tr.438). Even when the "frisk" disclosed nothing suspicious, Sergeant Henry (according to Officer Reddy) kept his hand on Best's arm (S.App. Reddy Tr.207-208), and would not have let him leave if Best had wanted to (S.App. Henry Tr. 104). Certainly, before Bryant ever stepped out of the bank, Best was under arrest for the purposes of the 4th Amendment, as there was a significant interference with his "liberty of movement" by the arresting officers.

It is conceded that, pursuant to Terry v. Ohio, 392 U.S.1 (1968) and N.Y.C.P.L.§140.50 (McKinney, 1975), the officers could

validly have "stopped" and even "frisked" defendant-appellant Best if acting in conformity with the dictates of that authority. However, since, from the very beginning, their actions constituted an arrest, within the meaning of the 4th Amendment, the arrest, at the moment it was made, was required to be based upon probable cause, since the interference with Best's liberty herein went far beyond that contemplated in Terry:

> We merely hold today that "where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him. Such a search is a reasonable search under the Fourth Amendment, and any weapons seized may properly be introduced in evidence against the person from whom they were taken.
> Terry v. Ohio, supra, at 30-31.

(2)

As the Supreme Court stated in Beck v. Ohio, 379 U.S. 89, 91 (1964):

> Whether [the] arrest was constitutionally valid depends . . . upon whether, at the moment the arrest was made, the officers had probable cause to make it - whether at that moment the facts and circumstances

> within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense. (emphasis added)

Probable cause to make an arrest, it is respectfully urged, was on the facts herein, lacking, so that the arrest was constitutionally invalid.

Upon making their arrest, the only information that the arresting officers had was gleaned from what they had observed. Best and Bryant were first seen in the vicinity of the Chemical Bank at 156 Fifth Avenue in Manhattan (S.App. Henry Tr.77). Bryant entered the bank and got on the teller's line, while Best remained outside (S.App. Henry Tr.78-80, S.App. Reddy Tr.154). Best then walked east on 20th Street and conversed with Stanley Simpson (Galluba Tr.265), who was in the driver's seat of a car with the motor running (S.App. Henry Tr. 79, S.App. Reddy Tr.154). When Bryant left the Chemical Bank, Best had another conversation with him and the two walked north on Fifth Avenue (S.App. Reddy Tr. 155). They "peered" through the window of the Chase Manhattan Bank, had a five minute conversation and walked south on Fifth Avenue (S.App. Reddy Tr.159) to the Manufacturers Hanover Bank on 18th Street and Fifth Avenue. There, they had another short conversation, looked through the window of the bank and entered the bank (S. App. Reddy Tr. 159-160). In the bank Best was seen

standing on the teller's line, while Bryant had a conversation with a uniformed guard (S.App. Henry Tr.86). Here, the testimony conflicts.

Sergeant Henry testified that Bryant, "with his left hand in his left coat pocket", had his right arm around the guard's waist, near the guard's revolver and then walked with the guard to an alcove in the rear of the bank (S.App. Henry Tr.87). The guard, however, called as a witness in Bryant's behalf, didn't recall any such occurrence, but remembered only that a Black man had asked him whether or not he had seen a child with an ice cream cone (Vita Tr.450-452), after which, the guard had walked away.

During the few seconds he was observed in the bank, Best was seen waiting on the teller's line. He wasn't seen approaching a teller, putting his hand in his pocket in a threatening way or talking to anyone (S.App. Henry Tr.97).

The trial court, in its decision denying the pre-trial motions to suppress conceded that "when Henry confronted Best as he was exiting the bank, there may not have been sufficient probable cause to conduct a full search". United States v. Simpson, 400 F. Supp. 1396, 1399 (S.D.N.Y. 1975). Further, in a very similar set of facts, in a case decided in the Southern District of New York, it was held that no probable cause existed for an arrest.

In United States v. Thompkins 403 F.Supp. 350 (S.D.N.Y. 1975),

the court (Lasker, D.J.), held that there was no probable cause to make an arrest where:

> [T]hree plain clothes officers of the New York City Police Department observed a man standing on 1st Avenue looking across the street at a bank. Their suspicion aroused, the officers decided to keep [the man] under surveillance....
> [The man] crossed to the bank, looked in the window and entered, reappearing shortly in the company of [another]. In the period which followed the officers observed the two men make similar approaches to two other banks in the vicinity, although neither actually entered the second or third bank. After both suspects had approached the third bank and returned to their car the officers decided to close in.
> United States v. Thompkins, supra., at 351.

The government therein had contended that there was probable cause to "believe that the crime of conspiracy to rob a bank was being committed in [the officers'] presence." United States v. Thompkins, supra., at 352.

The court noted, however, that:

> [C]onspiracy by itself, however, in contrast to substantive crimes, see e.g., United States v. Tramunti, 513 F.2d 1087 (2nd Cir. 1975) and United States v. Wabnich, 444 F. 2d 203 (2nd Cir. 1971) is a crime peculiarly difficult to observe because of the near impossibility of "seeing" that the conspirators have - as they must to be in conspiracy - reached an agreement to commit a crime. While it is of course true that culpable mental states may sometimes be fairly induced from the observation of physical acts, when the only suspect activity observed is a conspiracy, a very strong showing is required to support the conclusion that probable cause has been established. We conclude that the information available to the officers as a

> result of their observations was not sufficient to raise their suspicions to the level of probable cause."
> United States v. Thompkins, supra., at 352.

It is respectfully submitted that this very same reasoning applies to this case, where the crimes charged both depended solely upon the operation of the defendants' minds and their acts, in and of themselves, were innocent.

Upon the facts presented in the case at bar, therefore, it is respectfully submitted that the arrest herein was not based upon probable cause.

(3)

Because the arrest of defendant-appellant Best was violative of his 4th Amendment rights, for want of probable cause, the fruits of that unlawful arrest were required to be suppressed. Wong Sun v. United States, supra.

Certainly, Best must have felt that he was under arrest, and subject to a full search at the earliest convenience of the police or he would not have attempted to discard the "demand note" in the close proximity of Sergeant Henry. Since Best's attempt to discard the note came only a matter of seconds after his unlawful arrest, and was obviously a result of that arrest, it was a fruit of that unlawful arrest within the meaning of Wong Sun.

Further, Best's confession should also have been suppressed

as the fruit of his unlawful arrest. As noted above at page 7 supra, Best's confession to Special Agent Joseph D. Martinolich was secured less than two hours after his arrest. It is conceded on this appeal that Best had first been given Miranda warnings by Martinolich before he gave the statements. However, it has been recently recognized by the United States Supreme Court that the Miranda warnings alone do not necessarily break the causal connection between an illegal arrest and a confession thereafter obtained. Brown v. Illinois, 422 U.S. 590 (1975).

In Brown, the defendant was arrested without probable cause and without a warrant. Taken to the police station and given the Miranda warnings, he was questioned by the arresting officers and, less than two hours after his arrest (as in the case at bar) made the first of two inculpatory statements. The Court held that despite the Miranda warnings, the temporal proximity of the confession to the arrest (less than two hours), when coupled with the investigatory purpose of the arrest and the flagrancy of the official misconduct, mandated suppression of the confession.

Here, not only had Best's confession followed his arrest by less than two hours, but, in addition to that temporal proximity, Best knew that the police had the "demand note", itself the fruit of his unlawful arrest. These facts, it is respectfully submitted, must be accorded significant weight in determining whether Best's confession was the fruit of his unlawful arrest. Further, as in Brown, the manner in which Best was arrested "gives the appearance of having been calculated to cause surprise, fright and confusion." Brown v. Illinois, supra, at 605.

Therefore, the demand note and Best's confession should have been suppressed, and, had they been suppressed, the jury would, most likely have rendered a verdict of acquittal on both counts. The fact that Best's confession was considered of great importance to the jury is demonstrated in that the jury called for Best's confession (App. Tr.666) after having been "deadlocked" since the prior night by a vote of 11 to 1 on both counts as to one defendant (App. Tr.673). Thereafter, it rendered a verdict as to all three defendants. One of two conclusions must, therefore be reached. Either the confession was the deciding factor in determining Best's guilt or innocence, or, the jury disregarded the law, as it was charged by the trial court that the confession was admissible only as against Best (App.Tr.667-668).

Because the demand note and the confession should have been suppressed, and their admission resulted in Best's conviction, his conviction should be reversed and a new trial ordered.

POINT II

THE TRIAL COURT'S REFUSAL TO CHARGE ON THE LAW OF PREPARATION VIS A VIS ATTEMPT WAS PLAIN ERROR WHICH AFFECTED THE SUBSTANTIAL RIGHTS OF THE DEFENDANTS

The law of attempt distinguishes between the stage of criminal intent and preparation and the stage of attempt. The common law spoke in terms of locus poenitentiae (literally, the place of repentance), the opportunity to change one's mind or to decide not to commit an intended crime. Webster's Third International Dictionary (1966), at 1329. Judge Learned Hand stated the common law as follows:

> "A neat doctrine by which to test when a person, intending to commit a crime which he fails to carry out, has 'attempted' to commit it would be that he has done all within his powers to do, but has been prevented by intervention from outside; in short that he has passed beyond any locus poenitentiae." United States v. Coplon, 185 F.2d 629, 633 (2d Cir. 1950), cert. denied 342 U.S. 920 (1952).

The federal law on attempt recognizes that the crime may have occurred even though the defendant has not passed beyond the locus poenitentiae but the question is one for the jury. Again, Judge Learned Hand in the Coplon case has stated the law quoting a decision by Justice Holmes when he was still on the Massachusetts

Supreme Judicial Court:

> "Preparation is not an attempt. But some preparation may amount to an attempt. It is a question of degree. If the preparation comes very near to the accomplishment of the act, the intent to complete it renders the crime so probable that the crime will be a misdemeanor, although there is still a locus poenitentiae, in the need of a further exertion of the will to complete the crime." United States v. Coplon, supra, 185 F.2d at 633.

Although Coplon was an espionage case, the same rule applies to the entry paragraph of the bank robbery statute, 18 U.S.C. §2113(a). Chief Judge Warren in Prince v. United States, 352 U.S. 322, 328 (1957) gave the theory of the statute:

> "It is a fair inference from the wording in the Act, uncontradicted by anything in the meager legislative history, that the unlawful entry provision was inserted to cover the situation where a person enters a bank for the purpose of committing a crime, but is frustrated for some reason before completing the crime. The gravamen of the offense is not in the act of entering, which satisfies the terms of the statute even if it is simply walking through an open, public door during normal business hours. [Footnote omitted]. Rather the heart of the crime is the intent to steal. This mental element merges into the completed crime if the robbery is consummated."

Those federal cases which find defendants guilty of the unlawful entry provision concern instances where the defendants were prevented by intervention from outside. United States v.

Bostic, 258 F.Supp. 977 (E.D.Pa. 1966)(arrival of uniformed policeman); United States v. Baker, 129 F. Supp. 684 (S.D. Cal. 1955)(teller tripped alarm; defendant apprehended in bank); United States v. Hart, 409 F. 2d 221 (10th Cir.), cert. denied, 396 U.S. 825 (1969) (defendants apprehended inside bank at 2:00 A.M.); Rumfelt v. United States, 445 F. 2d 134 (7th Cir.) cert. denied, 404 U.S. 853 (1971). In United States v. Foster, 478 F. 2d 1001 (7th Cir. 1973), the defendants changed their minds on the premises of the bank and left, but there one of the defendants testified for the Government.

In the case now on appeal, the defendants entered the Bank, made no demands for money, did not intimidate any Bank employees, then left the Bank. Yet the trial court refused to charge the law on attempt; it did not even read the statute on unlawful entry; instead, the trial court charged generally on conspiracy and bank robbery. The effect of that refusal to charge was to remove the only factual dispute from the province of the jury. The trial court committed plain error. See Mims v. United States, 375 F. 2d 135, 147 (5th Cir. 1967). The convictions of Bryant and Best on the substantive count should be reversed.

POINT III

THE DEFENDANTS SHOULD BE REMANDED FOR RESENTENCING PURSUANT TO F.R.Cr.P.32(c)(3)

The new F.R.Cr.P.32(c)(3) in effect as of December 1, 1975, governed the sentencing procedures of the three defendants on January 13, 1976. Under that rule, the report of the presentence investigation is to be made available to defense counsel upon request. Counsel for Simpson made that request (J.App.Tr.722); the Court's refusal to turn over that document was error. All defense counsel may rely upon the defendant Simpson's request since all three were sentenced at the same time, and together as"twins so to speak." (J.App.Tr.736).

Further, the Court stated that it was not sentencing Bryant and Simpson as youthful offenders (J.App.Tr.738-739), yet the Court stated that it had "decided not to send you to a jail type of institution for a given number of years, whether it be five, ten, 15 or 20. I have decided to put you in a place where you will be taught something as to how to use your God given skills * * *." (J.App.Tr.735). The only means by which the sentencing court could have implemented that decision was to have granted Bryant and Simpson youthful offender treatment. See United States v. Dorzynski, 418 U.S. 424, 431-436 (1974). Otherwise, the statement was mere surplusage. 18 U.S.C. §4082(a); Montos v. United States, 261 F. 2d 39, 40 (7th Cir. 1958).

The judgments should be reversed and the defendants remanded for resentence pursuant to F.R.Cr.P.32(c)(3). The appropriate appellate review of criminal cases extends to "the careful scrutiny of the judicial process by which the particular punishment was determined." United States v. Dorznyski, 418 U.S. 424, 433 (1974).

CONCLUSION

The judgments of conviction of the defendants Bryant and Best and the sentences imposed thereunder should be reversed and the case remanded for a new trial or in the alternative for a new sentence.

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